

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27138-2-III

Respondent,

Division Three

v.

VASILY PETROVICH GAYDARZHI,

UNPUBLISHED OPINION

Appellant.

Brown, J.—Vasiliy Petrovich Gaydarzhi appeals his felony harassment and resisting arrest convictions and his exceptional sentence. Mr. Gaydarzhi contends insufficient evidence supports his convictions. Further, he contends the trial court erred in allowing him to represent himself at trial, allowing prior bad act evidence, and imposing an exceptional sentence. We reject his contentions, and affirm.

FACTS

Natalya Gaydarzhi, who was 21-years-old at the time of trial,¹ is the daughter of separated parents, Mr. Gaydarzhi and Stepanida Gaydarzhi. According to Natalya, on

¹ For ease of reference, we refer to Natalya Gaydarzhi and Stepanida M. Gaydarzhi by their first names. We intend no disrespect.

February 24, 2008, she was at home with her mother when Mr. Gaydarzhi telephoned Stepanida. Natalya overheard the phone call. Mr. Gaydarzhi stated:

Are you out of your mind? Do you think you're independent? Do you think you can do this, you can just drive around within your car, or do you know what I am going to do to your car? I am going to blow that thing up. There is an ax sitting next to my bed. I am not responsible for what I do. I need you to know that right now.

2 Report of Proceedings (RP) (May 6, 2008) at 117. Natalya described her mother as crying and afraid for her life. Natalya called law enforcement.

The responding officers spoke with Stepanida and Natalya. Then they found Mr. Gaydarzhi standing outside of his residence. When Mr. Gaydarzhi started walking toward his apartment, the officers instructed him to come back, but he started running toward his apartment. The officers were eventually able to arrest him after a struggle.

The State charged Mr. Gaydarzhi with one count of felony harassment under RCW 9A.46.020(2)(b)(ii), alleging he threatened to kill Stepanida, and one count of resisting arrest under RCW 9A.76.040. The State later filed a notice of intent to seek aggravating circumstances. Specifically, "the current offense involves domestic violence, as defined in RCW 10.99.020 and, as provided by RCW 9.94A.535(3)(h) was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a long period of time." Clerk's Papers (CP) at 19. The State also gave notice of its intent to seek an exceptional sentence.

Before trial, Mr. Gaydarzhi requested to represent himself. After the court

engaged in a lengthy colloquy, it granted Mr. Gaydarzhi's request and appointed standby counsel.

Mr. Gaydarzhi, a native of the Ukraine, required two interpreters at trial. The court engaged in a lengthy self-representation colloquy with Mr. Gaydarzhi. Mr. Gaydarzhi told the court he had completed 10 years of school in the Ukraine, and that he had a college education. He steadfastly insisted on self-representation, saying, "The law allows me to protect myself, defend myself. . . . This issue is dissolved. It's resolved." 1 RP (May 5, 2008) at 8. When the court asked Mr. Gaydarzhi if he had ever studied law, he replied affirmatively. The court elicited Mr. Gaydarzhi's understanding of the charges.

The court had the State inform Mr. Gaydarzhi of his standard sentencing ranges. The State explained it would be seeking a five-year exceptional sentence based on the alleged aggravating circumstances. The court questioned Mr. Gaydarzhi:

[The Court:] Do you understand that if you are found guilty of these offenses, you could face up to five years in prison? Do you understand that?

[Mr. Gaydarzhi:] I understand it could be 50 years. I haven't done anything. I didn't do anything. You can give me 50 years.

1 RP (May 5, 2008) at 11. Additionally, the court informed Mr. Gaydarzhi of the potential community custody consequences.

Next, the trial court generally explained, and Mr. Gaydarzhi acknowledged, the need to follow rules of evidence and procedure. Mr. Gaydarzhi reiterated his decision

to represent himself, explaining he did not trust lawyers due to a negative experience.

The trial court permitted Mr. Gaydarzhi to represent himself, with standby counsel present in the court, explaining the need to follow the rules or be replaced by standby counsel. The court then explained the trial and sentencing process to Mr. Gaydarzhi, including the role of the jury in deciding guilt and the aggravating factors. Mr. Gaydarzhi responded that he understood the court's explanations.

The State sought introduction of bad acts evidence under ER 404(b). The trial court gave Mr. Gaydarzhi a copy of ER 404(b), and explained the rule to him. The trial court informed Mr. Gaydarzhi, "if you are not ready, we can have [standby counsel] represent you." 1 RP (May 5, 2008) at 33. Mr. Gaydarzhi replied, "I don't need that. I will represent myself. I know this the best." 1 RP (May 5, 2008) at 33. One interpreter related an aborted attempt to translate the State's trial memorandum to Mr. Gaydarzhi. The court explained the ER 404(b) hearing process to Mr. Gaydarzhi. Mr. Gaydarzhi indicated he understood.

Natalya testified regarding two specific incidents of physical violence by Mr. Gaydarzhi against Stepanida. In the first incident, occurring in the Ukraine when Natalya was five or six years old, Mr. Gaydarzhi stomped on Stepanida's legs, breaking one leg. In the second incident, occurring in the United States a couple of years before the trial, Mr. Gaydarzhi pushed Stepanida and grabbed her around the neck, and Natalya hit him with a candle to get him to let go. Natalya also testified to a third

incident, occurring in the Ukraine when she was six or seven years old, where their neighbor's truck was set on fire and blew up. She stated that Mr. Gaydarzhi told her he was responsible. Fourth, Natalya generally testified to several general instances of conduct by Mr. Gaydarzhi toward Stepanida, including verbal abuse, beatings, and threats.

Spokane Police Detective Stephanie Barkley testified that she interviewed Stepanida, that Natalya's testimony corroborated Stepanida's interview, and that the testimony was accurate. Detective Barkley related Stepanida showed her a scar on her leg, which Stepanida stated was broken by Mr. Gaydarzhi. Mr. Gaydarzhi cross-examined both Natalya and Detective Barkley without objection to the bad acts evidence. When the court again asked Mr. Gaydarzhi if he was sure he wanted to represent himself, Mr. Gaydarzhi responded he was sure.

The trial court ruled on the bad act evidence, allowing the first three, but disallowing the fourth general category of bad acts.

Before opening statements, the trial court again questioned Mr. Gaydarzhi about his understanding of the charges:

[Mr. Gaydarzhi:] I understand that in report State states clearly I called and threatened my wife. But why are you talking about bodily harm over the phone, cause bodily harm over the phone?

[The Court:] The charge is that you threatened to cause bodily harm.

[Mr. Gaydarzhi:] Oh, that's different. Yeah. I don't recall the first time.

2 RP (May 6, 2008) at 78.

In the State's case-in-chief, Natalya testified similarly to her bad acts hearing testimony without objection from Mr. Gaydarzhi, who cross-examined her on the topics.

Spokane Police Officer Nick Spolski testified that after he spoke with Natalya and Stepanida, he contacted Mr. Gaydarzhi outside his residence. Officer Spolski testified he was dressed in his police uniform, and he identified himself as a police officer. He testified he tried to talk with Mr. Gaydarzhi about what happened, but that Mr. Gaydarzhi began to quickly walk toward his door. Officer Spolski told Mr. Gaydarzhi to come back, and motioned for him to do so. He testified Mr. Gaydarzhi appeared to understand. Officer Spolski testified Mr. Gaydarzhi then started running toward his door. He further testified he chased Mr. Gaydarzhi, caught up with him at the door, and they both fell. Officer Spolski testified he took control of Mr. Gaydarzhi, told him to stop resisting, told him he was under arrest, and that Mr. Gaydarzhi was not listening to his directives to get on his stomach. He explained he and Spokane Police Officer Paul Buchmann were finally able to arrest Mr. Gaydarzhi after the described struggle.

Officer Buchmann testified similarly to Officer Spolski, and in particular:

[Mr. Gaydarzhi] kept trying to shove his hands under his body to keep them away, as well as pulling away from us. We were continuing to give him verbal commands, as well as just basic arm control techniques attempting to basically pry his arms out from underneath him and behind his back.

2 RP (May 6, 2008) at 147-48.

Detective Barkley testified she interviewed Natalya and Stepanida regarding the alleged threat. She further testified she interviewed Stepanida regarding the nature of her relationship with Mr. Gaydarzhi, and that Stepanida showed her the scar on her leg, after “there was an incident that she discussed about having her leg broken and I just asked her if I could see her leg.” 2 RP (May 6, 2008) at 151.

Mr. Gaydarzhi elected to testify, acknowledging he and Stepanida had some fights, but denying any harassment. Regarding the prior bad acts, Mr. Gaydarzhi testified Stepanida broke her leg falling off a scaffold at work. He denied being involved in setting his neighbor’s truck on fire and explained the truck had a short circuit. Finally, Mr. Gaydarzhi questioned Natalya’s ability to remember childhood events.

The jury found Mr. Gaydarzhi guilty of harassment, with a special verdict finding the threat was a threat to kill. The jury found Mr. Gaydarzhi guilty of resisting arrest. The jury answered “yes” to the following question in a special verdict form:

As to the charge of Harassment, was the offense part of an ongoing pattern of psychological or physical abuse of Stepanida Gaydarzhi manifested by multiple incidents of domestic violence over a long period of time?

CP at 80. The trial court concluded the aggravating circumstances were substantial and compelling and imposed an exceptional 60-month sentence for the felony harassment. In writing, the court concluded:

In the interest of justice and to accomplish the purposes of the Sentencing Reform Act, to ensure that punishment for the defendant’s

crime(s) are proportionate to the seriousness of those crimes, to provide protection to the public as well as to provide deterrence to the commission of these types of offenses, substantial and compelling reasons exist to depart from the guidelines and impose the sentence herein.

CP at 93. The court made a domestic violence finding.

Mr. Gaydarzhi did not object to the exceptional sentence. The court sentenced Mr. Gaydarzhi to 90 days' concurrent confinement on the resisting arrest count. Mr. Gaydarzhi appealed.

ANALYSIS

A. Self-Representation

The issue is whether the trial court erred in granting Mr. Gaydarzhi's self-representation request. Mr. Gaydarzhi contends he did not knowingly, intelligently, and voluntarily waive his right to the assistance of counsel.

The state and federal constitutions guarantee a criminal defendant the right to counsel and the right to self-representation. U.S. Const. amends. VI and XIV; Const. art. I, § 22; *see also Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (holding "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense"). "A criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand must be unequivocal in the context of the record as a whole." *State v. Modica*, 136 Wn. App. 434, 441, 149 P.3d

446 (2006), *aff'd*, 164 Wn.2d 83, 186 P.3d 1062 (2008) (citing *State v. Luvene*, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995)).

“Once a defendant unequivocally demands self-representation, the trial court must determine if the defendant has made a knowing, intelligent, and voluntary waiver of the right to assistance of counsel.” *State v. James*, 138 Wn. App. 628, 635, 158 P.3d 102 (2007), *review denied*, 163 Wn.2d 1013 (2008) (citing *State v. DeWeese*, 117 Wn.2d 369, 377, 816 P.2d 1 (1991)). We review a trial court’s grant of a defendant’s self-representation request for an abuse of discretion. *Id.* (citing *State v. Hemenway*, 122 Wn. App. 787, 792, 95 P.3d 408 (2004)). “Discretion is abused if the trial court’s decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002) (citing *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

A counsel assistance waiver “depends on the facts and circumstances of each case, and there is no checklist of the particular legal risks and disadvantages attendant to [the] waiver which must be recited to the defendant.” *DeWeese*, 117 Wn.2d at 378 (citing *State v. Imus*, 37 Wn. App. 170, 173-74, 679 P.2d 376 (1984)). While no set formula exists for determining the validity of a waiver, “the preferred method of ensuring a valid waiver is a court’s colloquy with the defendant conducted on the record.” *State v. Lillard*, 122 Wn. App. 422, 427, 93 P.3d 969 (2004) (citing *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001)). “At a minimum, a defendant must understand the

severity of the charges; the maximum possible penalties for the crime charged; and the existence of technical, procedural rules governing the presentation of a defense.”

James, 138 Wn. App. at 636 (citing *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)); see also *DeWeese*, 117 Wn.2d at 378 (acknowledging the same).

Mr. Gaydarzhi made an unequivocal request for self-representation. In an extensive colloquy with Mr. Gaydarzhi, the trial court explained the severity of the charges, the maximum possible penalties for the charges, including community custody, and the existence of technical, procedural rules governing the trial. See *James*, 138 Wn. App. at 636 (citing *Acrey*, 103 Wn.2d at 211). When asked if he understood the charges and the maximum term of confinement, Mr. Gaydarzhi indicated that he understood. Mr. Gaydarzhi acknowledged he understood he must follow the rules of evidence and procedure. The trial court gave Mr. Gaydarzhi a copy of ER 404(b), and explained the rule to him.

Mr. Gaydarzhi argues his limited ability to comprehend the English language compromised his ability to represent himself. But throughout the trial, two interpreters translated for Mr. Gaydarzhi and he did not inform the trial court of any inability to understand the proceedings because of his language barrier. Mr. Gaydarzhi argues his background, age, and experience hampered his ability to perform without counsel. However, “[w]hile a defendant’s education, literacy, and experience in prior trials are relevant, these factors are not dispositive of whether he understood the relative

advantages and disadvantages of self-representation in a particular situation.” *Lillard*, 122 Wn. App. at 428 (citing *Acrey*, 103 Wn.2d at 211). And, “[n]o showing of technical knowledge is required.” *Vermillion*, 112 Wn. App. at 857 (citing *Faretta*, 422 U.S. at 835). Accordingly, the trial court record satisfies the requirements for a valid waiver of the right to counsel. See *James*, 138 Wn. App. at 636 (citing *Acrey*, 103 Wn.2d at 211).

In his reply brief, Mr. Gaydarzhi argues for the first time that the trial court should have allowed standby counsel to interject in order to raise objections and to argue the validity of the exceptional sentence. We do not consider arguments raised for the first time in a reply brief. *Lewis v. City of Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991). Moreover, Mr. Gaydarzhi did not object to the appointment of his standby counsel and he does not show he asked for that assistance from him. *Silva*, 107 Wn. App. at 626.

In sum, the trial court did not abuse its discretion in ruling Mr. Gaydarzhi could represent himself. Given this record, Mr. Gaydarzhi entered a knowing, intelligent, and voluntary waiver of his right to counsel.

B. Evidentiary Error

The issue is whether the trial court erred in admitting evidence of Mr. Gaydarzhi’s prior bad acts pursuant to ER 404(b). However, Mr. Gaydarzhi did not object to the admission of any of the prior bad acts, either during the pretrial hearing or

during the trial itself. Because errors predicated on ER 404(b) are not of constitutional magnitude, they may not be raised for the first time on appeal. RAP 2.5(a); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Accordingly, we decline review.

C. Evidence Sufficiency

The issue is whether sufficient evidence supports Mr. Gaydarzhi's conviction for resisting arrest.

When reviewing evidence sufficiency, "the court must view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008) (citing *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205 (2006)). Further, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "Credibility determinations are for the trier of fact and are not subject to review." *Mines*, 163 Wn.2d at 391 (citing *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)).

"A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." RCW 9A.76.040(1). "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). "[T]he specific

criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “One may resist arrest by various types of conduct.” *State v. Ware*, 111 Wn. App. 738, 745, 46 P.3d 280 (2002) (quoting *State v. Williams*, 29 Wn. App. 86, 92, 627 P.2d 581 (1981)).

Here, Officer Spolski and Officer Buchmann testified Mr. Gaydarzhi began to quickly walk to his door, motioning both officers to follow him. Both officers told Mr. Gaydarzhi to stop, and Officer Spolski motioned for him to do so. Officer Spolski testified Mr. Gaydarzhi appeared to understand. Mr. Gaydarzhi then ran toward his residence. Once the officers caught up with him, and Officer Spolski advised him he was under arrest, Mr. Gaydarzhi tried to pull away from the officers. In addition, the officers had to force Mr. Gaydarzhi’s arms behind his back in order to arrest him. From these facts, a rational trier of fact could have concluded beyond a reasonable doubt that Mr. Gaydarzhi intentionally attempted to prevent the officers from arresting him.

D. Exceptional Sentence

The issue is whether the trial court erred in imposing an exceptional sentence for felony harassment. Although Mr. Gaydarzhi raises this issue for the first time on appeal, “[a] sentence outside the standard sentence range for the offense is subject to appeal by the defendant or the state.” RCW 9.94A.585(2).

Mr. Gaydarzhi contends the trial court erred, under RCW 9.94A.537(4), in failing

to conduct a separate proceeding regarding the aggravating circumstances evidence.

RCW 9.94A.537(4) provides:

Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if [1] the evidence supporting the aggravating fact is not part of the res geste [sic] of the charged crime, [2] if the evidence is not otherwise admissible in trial of the charged crime, and [3] if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

Here, the State alleged the aggravating circumstances listed in RCW 9.94A.535(3)(h)(i). RCW 9.94A.537(4) authorized the trial court to conduct a separate proceeding, if three criteria were met, rather than presenting the aggravating circumstances evidence during the trial. However, the statute provides that “the trial court *may* conduct a separate proceeding.” RCW 9.94A.537(4) (emphasis added). “In construing statutes and court rules . . . words like ‘may’ are permissive and discretionary.” *State v. Stivason*, 134 Wn. App. 648, 656, 142 P.3d 189 (2006) (citing *Rudolph v. Empirical Research Sys.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001)). Thus, the trial court had discretion regarding whether to conduct a separate proceeding.

Next, Mr. Gaydarzhi contends the felony harassment conviction was not a crime of domestic violence, because it is not listed under the definition of domestic violence

in RCW 10.99.020(5). Although felony harassment is not a listed crime, the statute provides that “[d]omestic violence’ includes but is not limited to the following crimes.” RCW 10.99.020(5). This language clearly indicates the list of crimes is merely illustrative and not inclusive. Accordingly, crimes which do not appear on the list may also be considered domestic violence.

Finally, Mr. Gaydarzhi contends the court lacked substantial or compelling reasons to impose the exceptional sentence, but he does not make any argument or cite any case law to support his position. Under these circumstances, we decline review. See RAP 10.3(a)(6) (The appellant’s brief should contain “[t]he argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record.”).

Moreover, the Sentencing Reform Act (SRA) provides a list of aggravating circumstances that, when found by a jury, can be utilized to support a sentence above the standard range. See RCW 9.94A.535(3). As noted in the facts, the State complied with the statutory requirements for alleging the charge against Mr. Gaydarzhi involved domestic violence. The jury resolved the factual issue of the aggravating circumstance against Mr. Gaydarzhi. Because the SRA authorizes the use of the aggravating circumstance to support a sentence above the standard range, as a matter of law, it justifies the imposition of the exceptional sentence. See, e.g., *State v. Nelson*, 108 Wn.2d 491, 495, 498-99, 740 P.2d 835 (1987) (where reason used to support

exceptional sentence was a mitigating factor listed in the SRA, it justified, as a matter of law, the imposition of the exceptional sentence).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Schultheis, C.J.

Sweeney, J.